[1995] 1 MLJ 10 FEBRUARY 1995 Reports 241–300

ALOR JANGGUS SOON SENG TRADING SDN BHD & ORS V SEY HOE SDN BHD & ORS

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–569–1993
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND EUSOFF CHIN SCJJ
28 JANUARY 1995

Civil Procedure *— Injunction — Interlocutory injunction to restrain company from transferring shares to purchaser — Allegation of fraud on minority shareholders — Whether serious issues to be tried — Whether necessary to preserve status quo — Delay — Whether damages adequate remedy — Balance of convenience*

Civil Procedure *— Locus standi — Shareholders applying for interlocutory injunction to restrain company from transferring shares to purchaser — Whether defendant should raise preliminary objection regarding shareholders' lack of locus standi or apply to strike out application — Rules of the High Court 1980 O 18 r 19 & O 33 r 2*

The appellants ('the shareholders') held about 43.75% of the shares in the first respondent ('the company'). The second respondent ('Lim') was the managing director of the company holding approximately 25.6% shares in the company. At a board of directors' meeting of the company in March 1992, it was resolved that Lim be authorized to act as representative of the company at all meetings of MGR Timber Marketing Sdn Bhd ('MGR') in which the company held 682,500 shares. Subsequently, at an extraordinary general meeting, the company resolved, inter alia, to sell the company's shares in MGR ('the shares') to Ng Kay Kim ('Ng') and Choong Keong Kor ('Choong'). A sale and purchase agreement ('the agreement') was executed between Lim, on behalf of the company, and Choong, under which Choong was to pay the company RM1.95m and obtain the discharge of a charge over land belonging to the company by paying the redemption sum, in return for the shares and also shares in two other companies belonging to the company. Unknown to the shareholders, MGR had applied to be listed on the second board of the Kuala Lumpur Stock Exchange and to offer 2.9m shares at RM2.30 each to the public. The shareholders brought a claim against the respondents, alleging fraud on themselves as the minority shareholders and alleging that the agreement was invalid as: (i) it was a device to defraud all the shareholders of the company since the shares would have fetched a higher price in the open market once MGR became public-listed; (ii) there had been an unauthorized variation of the terms of the agreement; and (iii) the company had resolved to sell the shares to both Ng and Choong and not Choong alone.

The shareholders obtained an ex parte interlocutory injunction against the respondents which was subsequently set aside by the same judge who found, inter alia, that: (i) the shareholders had no locus standi as the proper party to bring the action was the company; (ii) there was a delay in applying for the injunction; and (iii) damages were an adequate remedy. The shareholders have appealed.

Held, allowing the appeal:

(1) In deciding whether to grant an interlocutory injunction, the court must first consider whether the plaintiff's case raises serious issues to be tried and whether the injunction is a means of preserving the status quo pending trial. In this case, the judge had failed to consider the question of serious issues to be tried although all the issues raised by the shareholders were prima facie serious issues to be tried.

(2) If the respondents were alleging that the shareholders had no locus standi or cause of action, they should have invoked O 18 r 19 or O 33 r 2 of the Rules of the High Court 1980 ('the RHC') but did not. On this ground alone, the appeal should succeed.

(3) Furthermore, on the issue of locus standi, the judge should have but did not decide whether the shareholders came within the exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461, ie that aggrieved shareholders could bring an action on behalf of themselves where the wrongdoers were in control of the company.

(4) There was no delay on the part of the shareholders in applying for the injunction as time began to run from the discovery of the fraud, which was hardly two weeks before the writ was filed.

(5) Damages were not an adequate remedy as the different heads of damages claimed, eg for loss resulting from misuse of information by Lim and damages for fraud, could not be quantified easily.

(6) The balance of convenience clearly lay with the shareholders. If the interlocutory injunction is granted and the shareholders should fail at the trial, all that the respondents would suffer is the loss of profits and costs of the litigation which can be quantified and compensated, whereas if the injunction is refused and the shareholders should succeed, they would suffer unquantified monetary loss, harm and inconvenience which could not be adequately recompensed. In addition, since there was no evidence of the transfer of the shares to Choong or to any other persons, the status quo could be preserved.

[Bahasa Malaysia summary

Perayu ('pemegang saham itu') memegang lebih kurang 43.75% daripada saham di dalam responden pertama ('syarikat itu'). Responden kedua ('Lim') adalah pengarah urusan syarikat itu yang memegang lebih kurang 25.6% saham di dalam syarikat itu. Pada

suatu mesyuarat lembaga pengarah syarikat itu dalam bulan Mac 1992, suatu ketetapan telah dibuat bahawa Lim diberi kuasa untuk bertindak sebagai wakil syarikat itu di semua mesyuarat MGR Timber Marketing Sdn Bhd ('MGR') di dalam mana syarikat itu memegang 682,500 saham. Kemudiannya, pada suatu mesyuarat agung luar biasa, syarikat itu telah membuat ketetapan untuk, antara lain, menjual saham MGR ('saham itu') yang dimiliki oleh syarikat itu kepada Ng Kay Kim ('Ng') dan Choong Keong Kor ('Choong'). Sebuah perjanjian jual beli ('perjanjian itu') telah diikat di antara Lim, bagi pihak syarikat itu, dan Choong, di mana Choong dikehendaki membayar syarikat itu RM1.95 juta dan mendapat pelepasan suatu gadaian ke atas tanah yang dipunyai oleh syarikat itu dengan membayar jumlah penebusan, sebagai balasan untuk saham itu dan juga saham di dalam dua buah syarikat lain yang dipunyai oleh syarikat itu. Tanpa pengetahuan pemegang saham itu, MGR telah memohon supaya disenaraikan di atas papan kedua Bursa Saham Kuala Lumpur dan untuk menawarkan 2.9 juta saham pada harga RM2.30 setiap saham kepada orang awam. Pemegang saham itu telah membawa suatu tuntutan terhadap responden, mengatakan fraud telah dilakukan kepada diri mereka sebagai pemegang saham minoriti dan mengatakan bahawa perjanjian itu tidak sah kerana: (i) ia merupakan suatu cara untuk memfraud semua pemegang saham syarikat itu kerana saham itu akan mendapat harga yang lebih tinggi di pasaran terbuka apabila MGR menjadi sebuah syarikat awam; (ii) terdapat suatu variasi terma perjanjian itu tanpa kebenaran; dan (iii) syarikat itu telah bersetuju menjual saham MGR kepada kedua-dua Ng dan Choong dan bukan Choong sahaja.

Pemegang saham itu telah mendapat suatu injunksi interlokutori ex parte terhadap responden yang kemudiannya telah diketepikan oleh hakim yang sama yang memutuskan, antara lain, bahawa: (i) pemegang saham itu tidak mempunyai locus standi kerana pihak yang betul yang seharusnya membawa tindakan itu ialah syarikat itu; (ii) terdapat suatu kelengahan dalam membuat permohonan untuk injunksi itu; dan (iii) ganti rugi merupakan remedi yang mencukupi. Pemegang saham itu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Apabila memutuskan sama ada hendak memberikan suatu injunksi interlokutori, mahkamah mesti terlebih dahulu mempertimbangkan sama ada kes plaintif menimbulkan isu serius yang perlu dibicara dan sama ada injunksi itu adalah suatu cara untuk mengekalkan status quo semasa menunggu perbicaraan. Di dalam kes ini, hakim telah gagal mempertimbangkan soalan sama ada terdapat isu serius yang perlu dibicara walaupun semua isu yang ditimbulkan oleh pemegang saham itu adalah prima facie isu serius yang perlu dibicara.

(2) Jika responden mengatakan bahawa pemegang saham itu tidak mempunyai locus standi ataupun kausa tindakan, mereka

seharusnya menggunakan A 18 k 19 ataupun A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi ('KMT itu') tetapi tidak. Atas alasan ini sahaja, rayuan ini seharusnya berjaya.

(3) Lebih-lebih lagi, berkenaan dengan isu locus standi, hakim sepatutnya memutuskan sama ada pemegang saham itu jatuh di bawah pengecualian kepada rukun yang dinyatakan di dalam *Foss v Harbottle* (1843) 2 Hare 461, iaitu bahawa pemegang saham yang terkilan boleh membawa suatu tindakan bagi pihak mereka sendiri di mana orang yang bersalah itu menguasai syarikat itu, tetapi beliau tidak berbuat demikian.

(4) Tidak ada kelengahan pada pihak pemegang saham itu dalam membuat permohonan untuk injunksi itu kerana masa mula berlalu apabila fraud itu diketahui, yang tidak sampai dua minggu sebelum writ itu difailkan.

(5) Ganti rugi tidak merupakan remedi yang mencukupi kerana jenis ganti rugi yang dituntut, misalnya kerugian akibat daripada penyalahgunaan maklumat oleh Lim dan ganti rugi untuk fraud, tidak mudah dikira.

(6) Imbangan kemudahan jelas memihak kepada pemegang saham. Jika injunksi interlocutori itu diberikan dan pemegang saham itu gagal pada perbicaraan, apa yang akan dirugikan oleh responden ialah kehilangan keuntungan dan kos litigasi yang boleh dikira dan dipampasi, manakala jika injunksi itu ditolak dan pemegang saham itu berjaya, mereka akan mengalami kerugian kewangan yang tidak dapat dikira, kemudaratan dan kesulitan yang tidak boleh dipampasi dengan mencukupi. Tambahan pula, oleh kerana tidak ada bukti bahawa terdapat pemindahan saham itu kepada Choong atau sesiapa yang lain, status quo itu boleh dikekalkan.]

Notes

For cases on locus standi, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2272–2290.

For cases on injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725.

Cases referred to

Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 (folld)

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 (folld)

Automobiles Peujeot SA v Asia Automobile Industries Sdn Bhd & Ors [1988] 3 MLJ 209 (refd)

Burland & Ors v Earle & Ors [1902] AC 83 (folld)

CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] AC 1013; [1988] 2 All ER 484; [1988] 2 WLR 1191 (folld)

Carter v Trevelyan 11 CL & F 714 (folld)

Cayne & Anor v Global Natural Resources plc [1984] 1 All ER 225 (folld)
Chung Khiaw Bank Ltd v Bajaj Textiles Ltd & Anor [1968] 1 MLJ 299 (refd)
Daniels v Daniels [1978] Ch 406; [1978] 2 All ER 89; [1978] 2 WLR 73 (refd)
Edwards & Anor v Halliwell & Ors [1950] 2 All ER 1064 (refd)
Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218 (folld)
Eastman Co (Kilner House) Ltd v Great London Council [1982] 1 All ER 437; [1982] 1 WLR 2 (folld)
Evans Marshall & Co Ltd v Bertola SA & Anor [1973] 1 All ER 992; [1973] 1 WLR 349 (folld)
Foss v Harbottle (1843) 2 Hare 461 (folld)
Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 (refd)
Hj Wan Habib Syed Mahmud v Datuk Patinggi Hj Abdul Taib Mahmud & Anor [1986] 2 MLJ 198 (refd)
Heron International Ltd & Ors v Lord Grade, Associated Communications Corp plc & Ors [1983] BCLC 244 (folld)
Hew Sook Ying v Hiw Tin Hee [1992] 2 MLJ 189 (not folld)
Hubbard v Vosper [1972] 2 QB 84; [1972] 1 All ER 1023; [1972] 2 WLR 389 (refd)
Lord Cable, decd, Re [1977] 1 WLR 7 (folld)
Legg v Inner London Education Authority [1972] 3 All ER 177; [1972] 1 WLR 1245 (folld)
Mothercare Ltd v Robson Books Ltd [1979] FSR 466 (folld)
NWL Ltd v Woods [1979] 3 All ER 614; [1979] 1 WLR 1294 (refd)
Patel & Ors v WH Smith (Eziot) Ltd & Anor [1987] 2 All ER 569; [1987] 1 WLR 853 (folld)
Porter v National Union of Journalists [1980] IRLR 404 (refd)
Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2) [1982] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31 (distd)
R v Senate of the University of Aston [1969] 2 QB 538; [1969] 2 All ER 964; [1969] 2 WLR 1418 (refd)
Salisbury v Metropolitan Railway Co (1870) 22 LT 839 (refd)
Sheffield Nickel Co Ltd v Unwin (1877) 2 QBD 214 (distd)
Smith v Croft (No 2) [1988] 1 Ch 114; [1987] 3 All ER 909; [1987] 3 WLR 405 (folld)

Legislation referred to

Companies Act 1965 ss 132(c), 181(2)
National Land Code 1965 s 278(1)
Rules of the High Court 1980 O 18 r 19, O 33 r 2
Companies Act 1981 s 42 [UK]
Rules of Supreme Court O 18 r 19 [UK]

Appeal from: Civil Suit No 22–109–1993 (High Court, Pulau Pinang)

Low Hop Bing (*FL Siak* with him) (*Low Hop Bing & Associates*) for the appellants.

Manjit Singh (*Manjit Singh & Co*) for the first respondent.

Ghazi Ishak (*Ong Kheng Leong* with him) (*Ghazi & Lim*) for the second respondent.

Surinder Singh (*Ong & Manecksha*) for the third respondent.

Cur Adv Vult

Jemuri Serjan CJ (Borneo) (delivering the judgment of the court): This is an interlocutory appeal by a group of minority shareholders following the dissolution of an ex parte interlocutory injunction granted on 2 April 1993 by the High Court, Penang by the same judge who granted the ex parte interlocutory judgment. On the application by the defendants to set it aside ex facie, this case would belong to the normal run of interlocutory injunction cases but for the unorthodox procedure adopted by the defendants and approved by the learned judge in obtaining the dissolution of the interlocutory injunction. The affidavits filed by both parties in the interlocutory proceedings raise the spectre of difficult points of law and facts. It is to be noted that at this stage of the proceedings, the defendants have not as yet filed their defence. It is also to be noted that only Sey Hoe Sdn Bhd, the first defendant, and not its directors, other than Lim Cheng Teek @ Lim Chin Teik who is also the managing director of the company, are cited as defendants. It is necessary to recount the facts of the case as they appear from the statement of claim and the affidavits of the plaintiffs.

Facts of the case

The plaintiffs (the appellants in this appeal) are the shareholders holding about 43.75% in Sey Hoe Sdn Bhd, the first defendant (hereinafter referred to as 'the company'). Lim Cheng Teek, the second defendant, is the managing director of the company, holding approximately 25.6% shares in the company. At a board of directors' meeting of the company held on 5 March 1992, it was resolved that Lim Cheng Teek be authorized to act as representative of the company at all meetings of the MGR Timber Marketing Sdn Bhd which later on was known as MGR Corp Sdn Bhd ('MGR') in which the company originally had 682,500 shares. On 29 July 1992 the board of directors of the company held another meeting which was attended by all the directors of the company, namely, Lim Tee Yong, Lim Tee Keng, Lim Chin Hean and Lim Cheng Teek, and it was resolved that the secretary of the company do convene an extraordinary general meeting of the company for the purpose of considering the proposal to dispose of the company's shares in: (1) MGR Corp Sdn Bhd; (2) Maxall (Sabah) Sdn Bhd; (3) Perusahaan Kilang Papan Buildstrength Sdn Bhd; (4) Siegerim K–9 Co Sdn Bhd; and (5) Dapu Raya Sdn Bhd to Ng Kay Kim and Choong Keong Kor (the third defendant). Consequently, on 23 August 1992, the extraordinary general meeting of the company was held and attended by all the shareholders, namely, Lim Cheng Teek, as a proxy to his own company, Lim Chin Teik Holdings Sdn Bhd, Lim Tee Keng as a proxy to Lim Tee

Sin, Lim Tee Leong as a proxy to Lim Tee Tai, Lim Tee Keng, Lim Tee Leong, Lim Tee Chong, Lim Tee Yong, Lim Tee Khim and Lim Chin Hean as proxy to his own private company, Lim Chin Hean Holdings Sdn Bhd at which meeting the important resolution was arrived at that the company should dispose of its shares in the several companies referred to above. According to the minutes of the extraordinary general meeting, the disposal of those shares was subject, inter alia, to the following terms:

(1) That the purchaser shall pay the sum of RM25,000 being forfeitable deposit upon signing of the relevant agreement; and
(2) that the purchaser shall pay the relevant redemption sum to redeem the company's land held under Grant No 4905, Lot 104, Section 16, Town of Alor Setar, District of Kota Star, Kedah and to secure the discharge of charge from the Hongkong & Shanghai Banking Corp in Sabah within six calendar months from the date of the agreement; and
(3) that Lim Cheng Teek is authorized to execute the above relevant agreement.

Accordingly, pursuant to the resolution of the extraordinary general meeting, Lim Cheng Teek had the sale and purchase agreement ('the agreement') prepared by a firm of solicitors, Messrs Hoe & Ahmad Zaki, and on 1 September 1992, the agreement was signed by Choong Keong Kor as the purchaser and Lim Cheng Teek on behalf of the company. As it turned out, Ng Kay Kim dropped out of the transaction.

The civil suit No 22–109–1993 (MT1) arose out of the sale of the MGR shares, purportedly pursuant to the agreement which was alleged to be invalid. There are also allegations of the breach of the terms of the agreement on the part of Choong Keong Kor, particularly in respect of the payment of the balance of the purchase price which was to be effected by the discharge of the charge of the company's land by Choong Keong Kor and an unauthorized variation of the terms of the agreement by Lim Cheng Teek in order to enable Choong Keong Kor to settle the payment of the balance of the purchase price beyond the time stipulated in the agreement.

For the purpose of convenience, the relevant terms of the agreement are reproduced:

(1) The vendor shall sell the said shares together with all its interest whatsoever in Maxall (Sabah) Sdn Bhd and Dapu Raya Sdn Bhd to the purchaser and the purchaser shall purchase the same from the vendor at the purchase price of Ringgit one million nine hundred and fifty (RM1,950,000) only (hereinafter referred to as the purchase price).
(2) The purchaser shall pay the sum of Ringgit twenty five thousand (RM25,000) upon signing hereof by way of deposit and to account of the purchase price.
(3) The purchaser shall pay the balance of the purchase price to Hongkong & Shanghai Banking Corp in Sabah to redeem the said land and to secure the discharge of charge from the said bank within six (6) calendar months from the date hereof (hereinafter referred to as the complete date).
(4) The purchaser shall be responsible for all interest and other charges that Hongkong & Shanghai Banking Corp shall impose from

1 September 1992 until the payment of the balance of the purchase price to Hongkong & Shanghai Banking Corp to redeem the said land.

(5) The vendor shall deposit the original share certificate for the said shares with M/s Hoe & Ahmad Zaki, advocates and solicitors of No 1564, (Tkt 2) Wisma Southern Bank, Jalan Kota, 05000 Alor Setar, Kedah (hereinafter referred to as the said solicitors) together with the duly executed memorandum of transfer as stakeholder.

(6) Upon full payment of the balance of the purchase price and all interest and other charges as stipulated in cl 5 above, the said solicitors shall effect the transfer of the said shares to the purchaser or his nominee free of any encumbrances whatsoever.

...

(9) In the event the purchaser fails to pay the balance of the purchase price within the completion date or perform and comply with the terms and conditions herein contained, this agreement shall thenceforth be terminated and the deposit paid under cl 2 hereinabove shall be forfeited to the vendor and thereafter neither party shall have any claims whatsoever against the other.

Cause of action

The plaintiffs by their statement of claim instituted the civil suit No 22–109–93 (MT1) on the basis of a cause of action in contract and tort, and this is amplified by the affidavit of Lim Tee Keng, the second plaintiff, affirmed on 3 June 1993. Principles of company law inevitably are also interwoven into those of contract and tort. By para 14 of the statement of claim, the plaintiffs averred that the agreement is null and void and a device to defraud all the shareholders of the company. The particulars of the fraud are condescended to as follows. As a representative of the company in MGR, Lim Cheng Teek had attended several meetings of MGR and, therefore, was in possession of inside firsthand information that MGR would be public-listed on the KLSE second board in consequence of which MGR shares would most probably fetch a higher price in the open market. On 19 September 1992, *The Star* carried a news item in its business section that MGR was seeking a listing on the KLSE second board and in that event would be offering 2.9m shares at RM2.30 each. However, it was averred that Lim Cheng Teek never at any time disclosed to the shareholders of the company that MGR would be public-listed on the KLSE second board and the probable profits that would accrue therefrom.

Being a representative of the company in MGR, Lim Cheng Teek on his own initiative proposed at the board of directors' meeting of the company held on 29 July 1992 to dispose of the company's shares in MGR to Ng Kay Kim and Choong Keong Kor, both shareholders in MGR. It was also averred that Choong Keong Kor is related to Lim Cheng Teek. As a managing director of the company, Lim Cheng Teek owed the company a fiduciary duty and was bound to advise the shareholders of the company on the proposed public-listing of MGR and the advantage derived therefrom. Even after MGR was placed on the KLSE second board as a public-listed company on or about 20 August 1992, Lim Cheng Teek failed in his fiduciary duty to inform the shareholders of the company about it. Lim Cheng Teek purportedly signed the agreement, knowing

fully well that in doing so he had acted in breach of the resolution of the company's extraordinary general meeting of 23 August 1992, which authorized the sale of MGR shares to both Ng Kay Kim and Choong Keong Kor and not to Choong Keong Kor alone. The resolution had not been amended or varied at any time by another resolution of the extraordinary general meeting to enable him to do so.

Under cl 5 of the agreement, Lim Cheng Teek on behalf of the company was required to deposit the original MGR share certificates with Messrs Hoe & Ahmad Zaki, advocates and solicitors of No 1564, (Tkt 2) Wisma Southern Bank, Jalan Kota, 05000 Alor Setar, Kedah together with the executed memorandum of transfer as stakeholder. Acting in breach of this clause, Lim Cheng Teek took away the share certificates in order to perpetrate the fraud on the company and the plaintiffs. It was alleged that armed with the share certificates, Lim Cheng Teek was able, in conspiracy with Choong Keong Kor, to obtain all the rights issue and bonuses on the MGR shares, thereby increasing the original 682,500 shares to 1,365,000 shares. All this was done without the knowledge of the shareholders. The new MGR shares of the company were divided into three categories:

(a) 292,500 shares to be offered to the public;

(b) 648,000 shares were placed under a moratorium and to be disposed of at stipulated times; and

(c) 424,500 shares were transferred to UWB Nominees Sdn Bhd.

The sale of the shares to the public and to UWB Nominees again was carried out without the knowledge and consent of the shareholders. Similarly, the proceeds of the sale of the two categories of shares not covered by the moratorium had never been accounted for to the company or to the shareholders by Lim Cheng Teek.

Under cl 3 of the agreement, the purchaser, Choong Keong Kor, was given six months as from 1 September 1992 to discharge the charge and thereby settle the balance of the purchase price, the relevant completion date being 28 February 1993 but as on 26 February 1993, the charge had not been discharged. A search conducted at the Alor Setar Land Office on 31 March 1993 disclosed that the position had not changed. Therefore, going by cl 9 of the agreement, any failure on the part of Choong Keong Kor to pay the balance on the relevant date would result in the automatic termination of the agreement and the forfeiture of his deposit. As far as the plaintiffs were concerned, they alleged that there was no resolution to enlarge the time of the completion date. Under the circumstances, the motive of Lim Cheng Teek became evident, namely, to defraud the plaintiffs by abusing his position in MGR to his own advantage and that of those directors who supported him in the company. All this was achieved by Lim Cheng Teek in conspiracy with Choong Keong Kor.

In his affidavit dated 3 June 1993, Lim Tee Keng repeated the allegations contained in the statement of claim, highlighting the fact that Lim Cheng Teek took full advantage of his position in MGR by clever manipulation to omit his own personal shares from being placed under the moratorium as was the case with the company's shares, so that his shares

could be disposed of without delay and thereby fetch higher prices for them. Such manipulation was proof of Lim Cheng Teek's fraudulent and ulterior motive to benefit himself at the expense of the company and the shareholders. He also alleged that the sale of the MGR shares to Choong Keong Kor was conveniently made to further their conspiracy to defraud the plaintiffs, Choong Keong Kor being a shareholder of MGR and in possession of the vital inside information in advance regarding the public listing of MGR. Choong Keng Kor was but a nominal purchaser to provide a legitimate cover for what otherwise would be an illegal transaction. The agreement, therefore, was void as being tainted by fraud which had occasioned the loss of about RM7m.

In his affidavit dated 7 May 1993, Lim Cheng Teek dismissed the allegations against him and Choong Keong Kor as vexatious, scandalous and baseless and denied that he had abused his position in MGR as representative of the company to his own advantage. On the other hand, he averred that the sale of the MGR shares and others to Choong Keong Kor was approved by the annual general meeting which was also attended by the plaintiffs who never raised any objection in connection therewith. As a matter of fact, he had also informed the plaintiffs of the imminent public-listing of MGR but the plaintiffs took no notice of it. Besides, he also wrote to Lim Tee Tai, the fifth plaintiff, who was then in Australia about the possibility of MGR being public-listed. He also refuted the allegation that Choong Keong Kor was in any way related to him.

On the withdrawal of Ng Kay Kim from his bid to purchase the MGR shares, Lim Cheng Teek explained that although at the board of directors' meeting on 29 July 1992, the offer was to be made to both Ng Kay Kim and Choong Keong Kor at the extraordinary general meeting held on 23 August 1992, only Choong Keong Kor showed interest in buying the shares. He averred that the plaintiffs had waived the requirement of cl 5 as he needed the share certificate to be produced to MGR which was then in the process of changing its name from MGR Timber Marketing Sdn Bhd to MGR Corp Sdn Bhd. There was no breach of cl 3 as the balance of the purchase price had been paid, he having relied on the Hongkong & Shanghai Bank's letter of 26 February 1993 to the effect that the bank would expedite the discharge and release of the security as requested by the company. Lim Cheng Teek also raised the question of locus standi of the plaintiffs in bringing the civil suit, contending that it was not for the plaintiffs to bring the action because if there was any loss, it was a loss suffered by the company and in any case he only held 25.6% of the shares in the company. It is obvious here that Lim Cheng Teek expressed his doubt that the plaintiffs were in fact minority shareholders as they alleged. Assuming, if there was any remedy available to the plaintiffs, then it was he who should be sued in his capacity as the managing director of the company instead of the company and Choong Keong Kor.

In a further affidavit dated 15 June 1993, Lim Cheng Teek insistently denied any conspiracy between him and Choong Keong Kor and the other directors of the company to defraud the company and the plaintiffs since Lim Tee Keng himself was also a director. On the proliferation of the

original 682,500 MGR shares, Lim Cheng Teek disputed the averment that the 1,365,000 shares belonged to the company on the ground that the original shares were already sold to Chong Keong Kor which sale was already completed while the company only held the shares as trustee for Choong Keong Kor pending the registration of the transfer of the shares to him. Therefore, he argued the 1,365,000 shares clearly and legally belonged to Choong Keong Kor and not the company.

Two other directors of the company, Lim Chin Hean and Lim Tee Yong in support of the defendants' application to set aside the interlocutory injunction, in their affidavit dated 13 June 1993 confirmed that Lim Cheng Teek only held 25.6% shares in the company through his own company, Lim Chin Teik Holdings Sdn Bhd. Generally, this affidavit merely echoed the contents of Lim Cheng Teek's affidavits.

Choong Keong Kor also filed an affidavit affirmed on 11 June 1993 wherein he claimed that he was a bona fide purchaser for valuable consideration and had fully performed his part of the bargain in the agreement. He denied that there was any breach of the terms of the agreement. Neither was he related in any way to Lim Cheng Teek. He disclaimed any knowledge of the fraud allegedly perpetrated by Lim Cheng Teek alone or in conspiracy with him to defraud the company or the shareholders.

The High Court judgment

The learned judge in the court below allowed the application by the defendants to set aside the ex parte interlocutory injunction dated 2 April 1993 which he himself issued earlier. The salient points in his judgment may be summarized as follows. It is settled law that the court will not interfere with the internal management of a company, acting within its powers and has no jurisdiction to do so, and in order to redress a wrong done to the company or to recover monies or damages alleged to be done to the company that action should be brought by the company itself. His Lordship relied on the authority of *Burland & Ors v Earle & Ors* [1902] AC 83, PC and obviously *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2)* [1982] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31, CA. On the facts as he found them from the affidavit evidence, his Lordship was satisfied that the plaintiffs had no locus standi to bring the action against the defendants. Even assuming that the plaintiffs were the minority shareholders, based on the authority of *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189, SC, his Lordship found no evidence that the plaintiffs had attempted to resolve their grievances at the board of directors' meeting or the annual general meeting of the company. Furthermore, there was no evidence that the first and second defendants refused to allow the action to be taken by the company itself. Having regard to these principles, he found: (a) that the action of the plaintiffs was misconceived; (b) while admitting that the plaintiffs had established a cause of action, nevertheless the action was misconceived for the same reasons as he explained above; (c) as the remedy sought by the plaintiffs was damages for the loss of profits, damages was an adequate remedy. The loss suffered by the plaintiffs was financial

loss in that after the sale of the company's shares in MGR to Choong Keong Kor and after the public listing of the MGR shares, the value of the shares appreciated considerably. Therefore, if there was such a loss damages could be ascertained; (d) on the question of the balance of convenience, the balance was in favour of the defendants since the purchase price of the shares had been fully paid and the charge on the land was already released by Choong Keong Kor. The learned judge also held that the interest of Choong Keong Kor should be protected as he was a bona fide purchaser; and (e) the last ground was the delay on the part of the plaintiffs to bring the action which therefore prejudiced the rights of Choong Keong Kor in the MGR shares. He found that there was a delay of approximately six months between the time of the extraordinary general meeting of the company whereby the sale of the MGR shares to Choong Keong Kor was approved and the date of the ex parte application and about four months since the completion of the sale and the discharge of the charge. In both cases, the delay was not explained. On the authorities of *Hj Wan Habib Syed Mahmud v Datuk Patinggi Hj Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198, SC; *R v Senate of the University of Aston* [1969] 2 QB 538; [1969] 2 All ER 964; [1969] 2 WLR 1418; and *Chung Khiaw Bank Ltd v Bajaj Textiles Ltd & Anor* [1968] 1 MLJ 299, his Lordship found there was an unexplained delay which was fatal to the interlocutory injunction.

The learned judge after recounting the brief facts of the case also mentioned in his judgment that on the date of the hearing of the application to set aside the ex parte interlocutory injunction, counsel for the defendants raised a preliminary objection. He had heard the preliminary objection but decided to make no decision on the objection and to postpone it until he had heard the merits of the application. According to his Lordship, he took this step to avoid repeated appeals and delay in the proceedings.

American Cyanamid's case

When the question of the grant or refusal of an interlocutory injunction falls to be considered by the court, the leading case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 immediately comes to mind, which has been consistently and faithfully followed in our courts. The *American Cyanamid* case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the main issues between the parties can only be resolved by a trial. However, Lord Diplock himself who gave the definitive opinions in that case admitted later in his judgment in *NWL Ltd v Woods* [1979] 3 All ER 614; [1979] 1 WLR 1294, HL, that there are limitations in the guidelines. Lord Diplock observed ([1979] 3 All ER 614 at p 625; [1979] 1 WLR 1294 at p 1306):

> ... *American Cyanamid Corp v Ethicon Ltd*, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the

> action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial ....

Two prerequisites must be present before Lord Diplock's guidelines can come into play. First, the plaintiffs' case must raise serious issues to be tried. If the plaintiffs fail at that point there clearly is no case for an injunction. Secondly, the trial of the main suit is likely to take place in the sense that the plaintiffs' case shows that they are genuinely concerned to pursue the claim to trial and they are seeking the injunction as a means of holding operation pending the trial. Once it can be established that there are serious issues to be tried then the other guidelines must be invoked. The court has to consider:

(a) whether damages are an adequate remedy;

(b) where does the 'balance of convenience' lie; and

(c) are there any 'special factors'.

However, as is stated in *Hubbard v Vosper* [1972] 2 QB 84; [1972] 1 All ER 1023; [1972] 2 WLR 389 and approved by Lord Diplock in *American Cyanamid*'s case ([1975] AC 396 at p 407D; [1975] 1 All ER 504 at p 510; [1975] 2 WLR 316 at p 322) the discretion of the court to grant or refuse an interlocutory injunction should not be fettered by laying down any rules which would have the effect of limiting the flexibility of the remedy.

In England, the courts are enjoined to invoke *American Cyanamid*'s guidelines, whenever appropriate. This was emphasized in *Porter v National Union of Journalists* [1980] IRLR 404, where Lord Diplock observed at pp 406–407 thus:

> My Lords, at no stage in these proceedings has this been a case where grant or refusal of an interlocutory injunction, would have the effect of disposing of the action finally in favour of whichever party was successful upon the application, as was the case in *NWL Ltd v Woods* [1979] 3 All ER 614. The strike itself was over before the proceedings were begun. The only question was whether the plaintiffs could lawfully be expelled, or otherwise penalized, for having refused to take part in it; and it was unlikely, as subsequent events have shown, that either side would throw in their hands at the interlocutory stage of the action. So it was a case that fell within the normal rule laid down by the House in *American Cyanamid Co v Ethicon Ltd.* Slade J however, although he did refer to *American Cyanamid*, did not in his judgment consider the balance of convenience at all. *His failure to do so, in my view, vitiated any purported exercise of his discretion.* (Emphasis added.)

In the court below, the question of serious issues to be tried was never canvassed by counsel for the defendants and surprisingly the learned judge never touched at all on this issue in his judgment even when Encik John Khoo had addressed the court on this point which must first be established. The omission of this issue in the judgment is conspicuous. It is evident from the notes of proceedings that Encik Manjit Singh for the company and Encik Ghazi for Lim Cheng Teek raised the locus standi of the plaintiffs to bring the action as their preliminary objection, it apparently

being the nub of their objection. The learned judge inexplicably allowed the application to hear the preliminary objection in a proceeding to hear an application by the defendants to set aside the ex parte interlocutory injunction. We would elaborate presently on this aspect of his Lordship's judgment. In the course of the arguments, both counsel cited the cases of *Burland v Earle* [1902] AC 83 and *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors* [1982] 1 Ch D 204; [1982] 1 All ER 354; [1982] 2 WLR 31. Encik Ghazi also submitted that the plaintiffs had no cause of action because if there was any loss, the loss would be suffered by the company and not the shareholders. It would seem, perhaps, from the point of view of the defendants if they could succeed on the locus standi issue, that would be the end of the case. The main action itself would have to be withdrawn consequently.

As we have said in the introductory part of our judgment, the procedure adopted by the defendants was unorthodox, a blatant departure from the correct procedure which Templeman LJ pointed out in the *Prudential Assurance* case and adopted by Knox J in *Smith v Croft (No 2)* [1988] 1 Ch 114; [1987] 3 All ER 909; [1987] 3 WLR 405. We, therefore, are of the view that we should make our observations on this aspect of the appeal as it appears that it has never been called for consideration in our court before.

Procedure

The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no locus standi or cause of action why did they not invoke O 18 r 19 or O 33 r 2 of the Rules of the High Court 1980 ('the RHC') because if they succeed in their applications on any of these orders the civil suit and the injunction itself would both collapse. We would demonstrate why invocation of O 18 r 19 or O 33 r 2 is the correct procedure by reference to authorities. The defendants relied heavily on the *Prudential Assurance* case to support their contention on the plaintiffs' lack of locus standi, and therefore directed the main thrust of their arguments in that direction. Unfortunately, Encik John Khoo for the plaintiffs never at any time raised any objection to this unusual departure from the normal accepted procedure for reasons best known to himself as it seems obvious to us there are relevant questions to be raised in his favour.

First of all, the *Prudential Assurance* case does not deal with injunctions but, inter alia, the rights of the minority shareholders to bring the action either a derivative action on behalf of Newman or in their own personal right and is not an authority on the issue of whether an interlocutory injunction should be set aside. Secondly, Templeman LJ in the course of delivering his judgment, criticized Vinelott J in dismissing the summons issued by Mr Bartlett and Mr Laughton, the other defendants in that case, when they invoked *Foss v Harbottle* (1843) 2 Hare 461, not on the ground that the plaintiffs were entitled to bring a derivative action but on the ground that it was more convenient to decide that issue after the action had been tried. Templeman LJ was clearly of the view that Vinelott J had

erred when he failed to determine the crucial issue whether where there was an allegation of fraud by the minority shareholders suing, as such they were entitled to the relevant claim and their action fell within the proper boundaries of the exception to the rule in *Foss v Harbottle*. This is evident from his observations ([1982] 1 Ch D 204 at p 221A–B; [1982] 1 All ER 354 at p 365; [1982] 2 WLR 31 at p 47):

> In the result it would be improper for us to express any concluded view on the proper scope of the exception or exceptions to the rule in *Foss v Harbottle*. We desire, however, to say two things. First, as we have already said, we have no doubt whatever that Vinelott J erred in dismissing the summons of 10 May 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivation action ....

Further down the page Templeman LJ continued:

> ... In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case: (i) that the company is entitled to the relief claimed; and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v Harbottle* ....

The relevant exception to the rule in *Foss v Harbottle* in so far as this case is concerned is the first exception referred to by Jenkins LJ in his judgment in the case of *Edwards & Anor v Halliwell & Ors* [1950] 2 All ER 1064 at p 1067. This is how he expressed the first exception:

> The cases falling within the general ambit of the rule are subject to certain exceptions. It has been noted in the course of argument that in cases where the act complained of is wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority. It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue. Those exceptions are not directly in point in this case, but they show, especially the last one, that the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.

Lord Templeman's observations clearly enjoin the courts in such cases as the present that this crucial issue must first be determined at a preliminary hearing so that if the plaintiffs fail then *cadit quaestio*. What happened before Vinelott J's court happened also in the instant case though, admittedly, there was a hearing on a point of law on a different issue altogether and there was no argument and no direction by the learned judge to have this crucial issue argued and witnesses examined before him in order to determine that issue.

As a further illustration on the proper procedure to be adopted on this same question, it would be illuminating to look at the other English

cases where the same issue was discussed at length. The procedure enjoined by Lord Templeman was adopted by Knox J in the case of *Smith v Croft* [1988] 1 Ch 114; [1987] 3 All ER 909; [1987] 3 WLR 405. The facts of the case are briefly as follows. The plaintiffs, who held a minority of shares in F Ltd brought an action against F Ltd, three executive directors and the chairman, a non-executive director, and four companies closely associated with one or other of the three executive directors, claiming that the directors had paid themselves excessive remuneration, that the payments in 1982 to the associated companies were contrary to s 42 of the Companies Act 1981 and that certain payments of expenses to directors were excessive. The plaintiffs between them held 11.86% of the issued shares in F Ltd, the defendants between them held 62.54% of the remaining shares, 2.54% were held by a company which actively supported the plaintiffs, while 3.22% were held by persons or companies which, it was common ground, were to be treated as supporting the defendants, and W Ltd, a company not under the control of either the plaintiffs or the defendants, held 19.66% of the shares in F Ltd and was opposed to the continuance of the plaintiffs' action.

On a motion by the chairman and F Ltd to strike out the plaintiffs' action under O 18 r 19 the Rules of the Supreme Court ('the RSC') or under the inherent jurisdiction as vexatious, frivolous or an abuse of process it was held ([1988] 1 Ch 114 at p 115):

(1) that the defendants' application raised the issue whether the plaintiffs could proceed with their minority shareholders' action and, although that raised difficult questions of law, the defendants, by invoking the procedure under RSC O 18 r 9 rather than the procedure for determining a preliminary issue of law under RSC O 33 r 3, had not adopted such an inherently defective procedure that the court should not proceed to determine the issues raised; and that since the effect of the court deciding those issues against the plaintiffs would be determinative of the action, the court would entertain the application and consider whether prima facie the company was entitled to the relief claimed in the action and whether the action was within the exception to the rule in *Foss v Harbottle*.

(2) That although excessive remuneration paid to directors might be an abuse of power, where the power to decide remuneration was vested in the board, it could not be ultra vires the company; and that in view of the uncontradicted evidence about the specialized field in which the company operated and the high levels of remuneration obtaining there it was more likely that the plaintiffs would fail than succeed on the issue of quantum; that likewise no prima facie case had been shown that the executive directors' expenses were excessive; and that, prima facie, the payments to associated companies were not ultra vires since payments at the request of an executive director to an outside entity were capable of being payments in respect of services rendered by the executive director, save that there was a prima facie case of irregularity regarding certain payments not fully cured by subsequent adoption of the accounts at the annual general meetings at which those payments should have been disclosed; that since the admitted payments of £33,000 to associated companies had not been shown to be reasonably necessary for the purpose of providing for amounts likely to be incurred by way of directors'

remuneration there was a prima facie case of infringement of s 42 of the Companies Act 1981.

(3) That although a minority shareholder had locus standi to bring an action on behalf of a company to recover property or money transferred or paid away in an ultra vires transaction, he did not have an indefeasible right to prosecute such an action on the company's behalf; that it was proper to have regard to the views of the independent shareholders, and their votes should be disregarded only if the court was satisfied that they would be cast in favour of the defendant directors in order to support them rather than for the benefit of the company, or if there was a substantial risk of that happening; that there was no evidence to suggest that the votes of W Ltd would be cast otherwise than for reasons genuinely thought to be for the company's advantage; and that, accordingly, since the majority of the independent shareholders' votes, including those of W Ltd, would be cast against allowing the action to proceed, the statement of claim should be struck out.

Knox J reviewed and dealt extensively with all the authorities including *Prudential Assurance* case on the application of O 18 r 19 and O 33 r 3 of the RSC. It is pertinent to reproduce the relevant passage of his judgment on the procedure. His observation on this passage appears as follows ([1988] 1 Ch 114 at p 135; [1987] 3 All ER 909 at p 919; [1987] 3 WLR 405 at p 418):

> I am satisfied that the statements which I have read in the Court of Appeal as to the procedure to be adopted in these matters, although plainly obiter as was in fact conceded, should be regarded by me as a guide to be followed as faithfully as possible. In my judgment, as a matter of procedural law, either O 18 r 19 or O 33 r 3 is a potentially possible vehicle for such an application as is involved in the present case to decide whether a plaintiff minority shareholder has the necessary locus standi. But for present purposes it is sufficient for my decision to hold, as I do, that the procedure under O 18 r 19 is not of itself an impossible procedure which leads to an application, made under that rule or under the inherent jurisdiction, to be struck out as being evidently improper. It seems to me that although the Court of Appeal undoubtedly had O 33 procedure before it in the form of the summons in relation to which they were discussing the propriety of what had happened below, their guidance was intended to be general in relation to minority shareholders' actions, and on that basis I find that *the procedure is not inherently defective.* (Emphasis added.)

In an earlier case, Sir Robert Megarry VC also had occasion to deal with the same issue in the case of *Eastman Co (Kilner House) Ltd v Great London Council* [1982] 1 All ER 437; [1982] 1 WLR 2. The relevant passage in his judgment on this issue appears as follows ([1982] 1 All ER 437 at p 447; [1982] 1 WLR 2 at p 14):

> ... This is, of course, only a motion, and there has been no viva voce evidence or cross-examination on affidavits. It is clear from the decision of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* that it is right that a *Foss v Harbottle* point *should where possible be decided as a preliminary issue and not left for determination at the trial.* On such an application the court has to do the best it can on the evidence and other material which the parties have chosen to put before it, even though further

> evidence and other material may well be put forward later, and perhaps lead to other conclusions .... (Emphasis added.)

Under the circumstances, after considering the authorities above starting from *Prudential Assurance*, we are satisfied in our own minds that the learned judge had erred in the same way as Vinelott J in that case in not dealing with the question whether the plaintiffs' case comes within the exception to the rule in *Foss v Harbottle*'s case. His Lordship's decision on the locus standi, therefore, is not definitive and conclusive as there were no adequate and comprehensive arguments on that issue to enable him to do so.

It was open to the defendants to resort to O 18 r 19 or O 33 r 2 of our RHC but they chose not to do so but to bring up the locus standi issue on their application to set aside the injunction. On this ground alone, this appeal should succeed. It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 but it is still open to them to have recourse to O 33 r 2 if they are so minded.

Encik Ghazi also brought up an important point in that the plaintiffs being merely shareholders representing about 43%, the matter in dispute should be resolved with the company first. This argument found favour with the learned judge, citing the case of *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189. On this point, we would again refer to the passage in Knox J's judgment in the case of *Smith v Croft (No 2)* ([1988] 1 Ch 114 at p 184C–F; [1987] 3 All ER 909 at p 956; [1987] 3 WLR 405 at p 459):

> As to that Mr Potts submitted that no reported authority held that in a case falling within the fraud on a minority exception to the rule in *Foss v Harbottle* the court should go beyond seeing whether the wrongdoers are in control and count heads to see what the other shareholders, ie those other than the plaintiffs and the wrongdoers, think should be done. I accept that in many reported cases the court has not gone on to the second stage. *Mason v Harris* (1879) 11 Ch D 97 is one such case, and there are modern examples too, such as *Pavlides v Jensen* [1956] Ch 565 and *Daniels v Daniels* [1978] Ch 406. But the fact that such an investigation was not conducted is not conclusive that it could not be conducted, more especially in the absence of any argument on this precise point. An investigation for interlocutory purposes of the propriety of the exercise of voting power in connection with the proposed prosecution of a minority shareholder's action was conducted by Sir Robert Megarry VC in *Eastman Co (Kilner House) Ltd v Great London Council*. In that case he permitted the action to proceed, but Mr Aldous submitted that the careful scrutiny to which the propriety of the shareholders' voting activities was subjected is of itself an indication of the significance that the court in a proper case will attach to it. This I accept.

From this passage it would appear that this investigation should be carried out during the hearing of the preliminary issue whether the plaintiffs' case comes within the exception to the rule in *Foss v Harbottle*. That is all we need to say on this point in our answer to *Hew Sook Ying*'s case.

Locus standi

In the course of hearing this appeal, we permitted Encik Ghazi to make his submission on locus standi when he brought the issue before us because it is the main issue that was discussed at considerable length by the learned judge. Notwithstanding what we have said about the procedure that should be adopted in dealing with the locus standi point, we feel constrained to deal with this point. Before us, Encik Ghazi adopted his own arguments on this point in the court below and in reply, Encik Low Hop Bing also supported Encik John Khoo's arguments in the court below. In order to dispose of this point we have to make reference to the plaintiffs' cause of action, particularly the one based on tort, ie fraud. There is the allegation of fraud on the part of Lim Cheng Teek in conspiracy with Choong Keong Kor when the sale of the original 682,500 shares in MGR was transacted. The other cause of action is based on contract in that it is alleged by the plaintiffs that the agreement is void and of no effect thereby nullifying any transfer of the shares to Choong Keong Kor pursuant thereto. Damages are prayed for in consequence of the fraud and the breach of the agreement.

Encik Ghazi disputed Lim Tee Keng's averment that the plaintiffs are the minority shareholders since Lim Cheng Teek had only 25.6% of the company's shares and was cited as the second defendant besides the company itself. The other two directors of the company, namely, Lim Chin Hean and Lim Tee Yong were not sued. The learned judge agreed with this contention although he conceded that if the shares of the two directors were taken into account then the defendants would be the majority shareholders. This is a technical point on procedure. The fact that the company was cited as a defendant and the further fact that these three directors, namely, Lim Cheng Teek, Lim Chin Hean and Lim Tee Yong are said to be in control of the company, the submissions of Encik Ghazi lost all its sting. In any event, it is still not too late for the plaintiffs to amend the writ and statement of claim by adding the other two directors in order to clearly show that they are minority shareholders. We need only to refer to some authorities where the minority shareholders are entitled to bring an action against its own directors and the company in its own personal capacity. Notably, among these authorities are the cases of:

(1) *Daniels v Daniels* [1978] Ch 406; [1978] 2 All ER 89; [1978] 2 WLR 73;

(2) *Eastman Co (Kilner House) Ltd v Great London Council* [1982] 1 All ER 437; [1982] 1 WLR 2;

(3) *Burland v Earle* [1902] AC 83; and

(4) *Heron International Ltd & Ors v Lord Grade, Associated Communications Corp plc & Ors* [1983] BCLC 244.

The relevant part of Templeman J's judgment in *Daniel*'s case is as follows ([1978] Ch 406 at pp 413–414; [1978] 2 All ER 89 at p 96; [1978] 2 WLR 73 at pp 79–80):

> The authorities which deal with simple fraud on the one hand and gross negligence on the other do not cover the situation which arises where, without fraud, the directors and majority shareholders are guilty of a breach of duty which they owe to the company and that breach of duty not only harms the company but benefits the directors. In that case it seems to me that different considerations apply. If minority shareholders can sue if there is fraud, *I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority shareholders themselves.* It would seem to me quite monstrous particularly as fraud is so hard to plead and difficult to prove — if the confines of the exception to *Foss v Harbottle* (1843) 2 Hare 461 were drawn so narrowly that directors could make a profit out of their negligence .... (Emphasis added.)

In *Eastman Co*'s case, Sir Robert Megarry J's observations on this important issue are at [1982] 1 All ER 437 at p 445; [1982] 1 WLR 2 at p 12C–F:

> It was on the firmly established exception of 'fraud on a minority' that Mr Steinfeld mainly relied. It does not seem to have yet become very clear exactly what the word 'fraud' means in this context; but I think it is plainly wider than fraud at common law, in the sense of *Derry v Peek* (1889) 14 App Cas 337. In a valuable survey of the authorities, Templeman J recently came to the conclusion that this head permitted the minority to sue even though there had not been even an allegation of fraud: *Daniels v Daniels.* This was a case in which a husband and wife were the two directors of a company and also the majority shareholders. They caused the company to sell to the wife land owned by the company; and four years later she sold the land for over 28 times what she had paid for it. The judge refused to strike out the statement of claim of minority shareholders in *Foss v Harbottle* (1843) 2 Hare 461 proceedings against the two directors and the company. The principle which he derived from the cases was that:
>
> > '... a minority shareholder who has no other remedy may sue where directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company': see p 414.
>
> Apart from the benefit to themselves at the company's expense, the essence of the matter seems to be an abuse or misuse of power. 'Fraud' in the phrase 'fraud on a minority' seems to be being used as comprising not only fraud at common law but also fraud in the wider equitable sense of that term, as in the equitable concept of a fraud on a power.

He continued in the following words ([1982] 1 All ER 437 at p 447; [1982] 1 WLR 2 at pp 14H–15A):

> It accordingly seems to me that even if Mr Brodie were right in his main submissions of law (and I do not think that he is), as the evidence stands he has not got the necessary facts to support them. This is, of course, only a motion, and there has been no viva voce evidence or cross-examination on affidavits. It is clear from the decision of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* that it is right that a *Foss v Harbottle* point should where possible be decided as a preliminary issue and not left for determination at the trial. On such an application the court has to do the best it can on the evidence and other material which the parties have chosen to put before it, even though further evidence and other material may well be put forward later, and perhaps lead to other conclusions.

I may add that if Mr Brodie were right, and the test was whether the majority genuinely believed that their action was in the best interests of the company, the *genuineness of the belief would often be difficult to decide as a preliminary issue without virtually a full trial of the point.* (Emphasis added.)

The relevant passage of the judgment of Lord Davey in *Burland*'s case appears in [1902] AC 83 at p 93 and reads as follows:

... But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. *The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company.* A familiar example is, where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of *Menier v Hooper's Telegraph Works* (1874) LR 9 Ch 350. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Mellish LJ in *MacDougall v Gardiner* (1875) 1 Ch D 13 at p 25. (Emphasis added.)

Lawton LJ in *Heron*'s case [1983] BCLC 244 at pp 261–262 observes on this issue:

... First, ACC will suffer a loss to the extent that its shares in Central are depreciated in value. That is a loss exclusively to the coffers of ACC. It is not a loss to the pockets of the shareholders in ACC, although it might, in theory, cause the market value of ACC shares to fall. No shareholder in ACC could sue the directors for a diminution in the value of his shares on that account for the reason given by this court in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at p 366:

> 'But what he (a shareholder) cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares ... because such a 'loss' is merely a reflection of the loss suffered by the company.'

The other direction in which loss would be suffered is the loss to the pockets of the shareholders because they are deprived of the opportunity of realizing their shares to greater advantage. That is *a loss suffered exclusively to the pockets of the shareholders, and is in no sense a loss to the coffers of the company, which remain totally unaffected.* (Emphasis added.)

It is only the first type of injury to which the rule in *Foss v Harbottle* is directed. The rule does not come into play where a plaintiff seeks to sue for the second type of injury ....

On these authorities, it could not be conclusively said that the plaintiffs do not have locus standi. Again, for the above reasons the appeal should be allowed on the locus standi point.

There is another matter that calls for our consideration merely for the purpose of completeness. Encik Low contended that apart from the authorities, the plaintiffs' action was founded on ss 181(2) and 132(c) of the Companies Act 1965. Encik Ghazi quite rightly drew our attention to the fact that none of the prayers came under s 181(2) while s 131(c) is a penal provision and could not, therefore, be the basis of the action. With respect, we agree with Encik Ghazi's contention on this point. The plaintiffs' cause of action is not founded on s 181(2) and the Companies Act 1965 as was the case in *Automobiles Peujeot SA v Asia Automobile Industries Sdn Bhd & Ors* [1988] 3 MLJ 209 which, therefore, does not help to further the plaintiffs' arguments.

Delay

Having disposed of the troublesome issue, we would now proceed to consider the real issue in this appeal, ie whether the interlocutory injunction issued on 2 April 1993 and dissolved on 27 August 1993 should be restored. We would first deal with the question of delay. As with all equitable reliefs, delay is a relevant factor in interlocutory proceedings for injunctive relief. An important maxim in regard to delay is that equity aids the vigilant, and not those who sleep on their rights; '*vigilantibus, non dormientibus, jura subeniunt*'. The essence of an application for interlocutory injunction is that it should be made with promptitude. It is said that the court will not grant an interlocutory injunction if the plaintiff *having sufficient notice of the defendant's intention to commit the act* sought to be restrained is *guilty of unreasonable delay* in applying to the court. The illustration of this principle is to be found in the case of *Salisbury v Metropolitan Railway Co* (1870) 22 LT 839. The cases of *Hj Wan Habib Syed Mahmud* [1986] 2 MLJ 198 and *Chung Khiaw Bank Ltd* [1968] 1 MLJ 299 cited above are Malaysian authorities on the same point. It must be pointed out, however, that not all delay is bad delay or, to be precise, inexcusable, as it may be explained or inevitable.

Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 set out three factors which are relevant in considering whether delay should be allowed as a ground to refuse an interlocutory injunction. These factors are at [1968] 2 QB 229 at p 268; [1968] 1 All ER 543 at p 561; [1968] 2 WLR 366 at p 390. Salmon LJ said:

> ... In order for such an application to succeed, the defendant must show:
> (1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff — so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognize when it occurs.

(2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
(3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

It must also be emphasized here what is important to consider is not so much the length of the delay but whether the delay has in some ways made it unjust to grant the injunction claimed. Megarry J's observation in the case of *Legg v Inner London Education Authority* [1972] 3 All ER 177 at p 191; [1972] 1 WLR 1245 at pp 1259–1260 is apposite:

> I have hesitated somewhat on this point. What seems to be important is not so much the length of the delay per se, but whether the delay has in some ways made it unjust to grant the injunctions claimed. An injunction granted now would be more burdensome to the ILEA and to the parents and boys affected by it than an injunction granted two months ago. Nevertheless I am not persuaded that the added burden is of sufficient weight to bar the remedy ...

Having said all that, we must first determine at what point of time should delay run in the instant case. Encik Manjit Singh submitted that the relevant date should be 19 September 1992 which was the date when *The Star* published the advertisement that MGR intended to seek public-listing on the KLSE second board. As the application for the ex parte injunction was only filed and granted on 2 April 1993, there was a delay of about seven months (sic) which had never been explained. On the other hand, his Lordship held that there was a delay of about six months from the date of the extraordinary general meeting of the company, ie on 23 August 1992, whereat it was resolved to dispose of the MGR shares, which, according to him, on the advice of Encik Manjit Singh was on 25 December 1992 and signified at the same time, the settlement of the balance of the purchase price of those shares by Choong Keong Kor, to the date of the application for the ex parte injunction, and about four months from the date of the discharge of the relevant charge. On what uncontroverted testimony did his Lordship find that the charge was discharged on 25 December 1992 is baffling because neither in his affidavit dated 11 June 1993 nor in that dated 3 June 1994, did Choong Keong Kor ever aver that he paid the balance of the purchase price on that date. The relevant exhibit on this point, on the other hand, shows that the charge was only discharged on 4 May 1993. It would seem from the submission of counsel for the defendants and the finding of the learned judge that there are three different dates from which delay begins to run. It certainly cannot be right in the instant case that there should be three different dates for the purpose of determining the relevant date on which delay begins.

Encik Low, on the other hand, contended that there was no delay, echoing the same stand taken by Encik John Khoo in the High Court

below. Encik John Khoo submitted that the question of delay did not arise as the plaintiffs only became suspicious of the bona fides of the transactions on the sale of the MGR shares when the legal firm of Messrs Hoe & Ahmad Zaki failed to reply to a letter dated 10 March 1993 from the plaintiffs through their solicitors, Messrs Ismail Khoo & Associates, inquiring as to the whereabouts of MGR original share certificates which the former kept as stakeholder under cl 5 of the agreement. In his affidavit dated 1 April 1993 and repeated in his further affidavit dated 3 June 1993, Encik Lim Tee Keng stated that in March 1993, the plaintiffs directed their solicitors to write to the firm of Messrs Hoe & Ahmad Zaki to enquire whether the share certificates had been delivered to Choong Keong Kor. Not having received any reply from the legal firm, on 17 March 1993, he paid a visit to Encik Hoe Thean Soon, the solicitor for the defendants to enquire from Encik Hoe Thean Soon personally about the share certificates but was told by the latter that they no longer kept the share certificates and promised to send a reply to their letter dated 10 March 1993. However, until the day the plaintiffs filed the writ no such letter was received. Hence, their suspicion was aroused and confirmed by his visit to Encik Hoe Thean Soon, on 17 March 1993, that something was very amiss about the whole affair of the transfer of the MGR shares to Choong Keong Kor. As a result of this grave suspicion, the writ was subsequently filed on 1 April 1993 and the application for an ex parte injunction filed on the following day. In addition to the above submission, Encik Khoo also submitted that a search at the Land Office at Kota Star on 31 March 1993 disclosed that the charge had not yet been discharged. It is implicit in Encik Khoo's arguments that the relevant date for the purpose of determining the delay was the discovery of the fraud which could not be earlier than the date of Lim Tee Keng's visit to Encik Hoe on 17 March 1993 but he did not cite any authority to support this proposition.

We agree with Encik Khoo's argument on the relevant date for the determination of delay. In considering the lapse of time, delay commences to run from the *discovery of the circumstances giving title to the relief.* See *Carter v Trevelyan* 11 C L & F 714 and *Salisbury v Metropolitan Railway Co* (1870) 22 LT 839. Another authority on this point is the case of *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218. Lord Blackburn on the question of delay had this to say at p 1279:

> ... And a court of equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been *such notice or knowledge* as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after *such notice or knowledge* should tell much more against the party *in mora*, than a similar change before he was *in mora* should do.

It sometimes happens one has been defrauded and the real facts are not apparent to him for years afterwards then one has a reasonable time from the discovery of the alleged fraud to bring his action; but not where he knows of the alleged fraud and acquiesces in the wrongful conduct of the defendant and deliberately refuses to assert his rights until sometime afterwards when he sustains an injury.

It is observed that the writ was originally filed on 1 April 1993, hardly two weeks after the discovery of the alleged fraud and within that short space of time perhaps, with insufficient facts to assist the solicitors to prepare the pleadings with such amplitude as to show they have a cause of action, the plaintiffs cannot be said to be guilty of unreasonable delay. The fact that a subsequent amended writ was filed on 27 May 1993 is testimony to the haste with which the original writ was prepared and filed to avoid unreasonable delay on the plaintiffs' part. We would say the plaintiffs, under those circumstances, had acted with due promptness, given the problems they were facing to get all the relevant information from the reluctant defendants, and are not guilty of any unreasonable delay as to defeat their claims for an interlocutory injunction.

Serious issues to be tried

As we have said earlier on, the learned judge briefly dealt with the question of cause of action as this point was canvassed by Encik Ghazi and held that there was a cause of action. The relevant part of the judgment in Bahasa Malaysia is as follows: '... Tanpa mengulangi perbincangan mengenainya, saya tidak fikir bahawa plaintif-plaintif tidak mempunyai kausa tindakan ...'.

There is nothing in the judgment to indicate any discussion or deliberation on the question of serious issue to be tried which must first be established by an applicant in an application for an interlocutory injunction. It is implicit in the judgment of Lord Diplock in the *American Cyanamid* case that if the material available to the court fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction, then the application must fail. Kerr LJ in *Cayne & Anor v Global Natural Resources plc* [1984] 1 All ER 225 applied the same test and went on to say that if the plaintiff failed to show he had raised a serious issue to be tried then clearly there was no case for an injunction. A similar principle was applied by Slade J in the case of *Re Lord Cable, decd* [1977] 1 WLR 7 and this is clear from what he said at p 19:

> ... On any claim for an interlocutory injunction the court must still, as a first step, consider whether the evidence available to the court discloses or fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial; if the available evidence fails to disclose this, the motion must fail in limine and questions of balance of convenience will not fall to be considered at all ...

See also the dictum of Balcombe LJ in *Patel & Ors v WH Smith (Eziot) Ltd & Anor* [1987] 2 All ER 569 at p 575; [1987] 1 WLR 853 at p 861D–E:

> ... If there is no arguable case, as I believe there is not, then questions of balance of convenience, status quo and damages being an adequate remedy do not arise. Prima facie the plaintiffs are entitled to an injunction to restrain trespass on their land. Certainly, having regard to the fact that the judge exercised his discretion on a basis which I have found to be an incorrect one, the discretion becomes that of this court and if it becomes necessary to choose between the line of authority represented by *Woollerton*

> *& Wilson Ltd v Richard Costain Ltd* [1970] 1 WLR 411 and *John Trenberth Ltd v National Westminster Bank Ltd* 39 P & CR 104 and that represented by *Behrens v Richards* [1905] 2 Ch 614 it seems to me quite impossible to say that there is no potential damage to be suffered here by the plaintiffs if the injunction is not granted and on that basis, if there is a discretion here, I would undoubtedly exercise it in favour of granting the interlocutory injunction to restrain trespass.

From these authorities, it is clear if the plaintiff fails to raise a serious issue to be tried, his application will fail in limine. (See the illustration of this principle in *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013; [1988] 2 All ER 484; [1988] 2 WLR 1191.)

In view of the welter of authorities especially those quoted above, it is beyond comprehension why the learned judge did not consider as a matter of principle and priority the question whether there was in this case a serious issue to be tried but leap-frogged to consider the question of adequacy of damages and balance of convenience instead. Counsel for the respondents on the other hand did nothing at all to impress upon the learned judge the importance of deciding first the question of serious issues to be tried, rest contented with the locus standi issue. Lord MacNaghten's quotation in a 1903 judgment 'With the light before him why should he shut his eyes and grope in the dark' would aptly describe counsel's conduct in handling this issue. We do not wish it to be misunderstood that in insisting on the adherence to the *American Cyanamid* guidelines, we were attempting to pontificate on those principles. The fact of the matter is those principles have been adopted and applied in our courts without fail when the case warranted it.

At an interlocutory proceeding for an injunction, the court is not called upon nor is it desirable for the court to decide finally on the rights of the parties but the court must be satisfied that there is a serious issue to be tried. The court is not justified in embarking upon anything resembling the trial of the action upon conflicting affidavits nor to evaluate the strength of either party's case. This is settled law now hallowed by the famous words of Lord Diplock in *American Cyanamid*'s case ([1975] AC 396 at p 407; [1975] 1 All ER 504 at p 510; [1975] 2 WLR 316 at p 323):

> ... It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations.

Since Encik Low raised the serious issues to be tried point and argued on it at considerable length before us and Encik John Khoo before the learned judge, it is incumbent on us to make our finding on this issue. It would be necessary, at the risk of being repetitive, to recapitulate on the plaintiffs' cause of action. Basically, the action is for a declaration that the agreement of 1 September 1992 is void being ultra vires the resolution of the extraordinary general meeting of the company held on 23 August 1992 and that even if it is valid, which is denied, there is also a breach of the terms of the agreement, particularly cll 3 and 5, resulting in the automatic termination of the agreement. It is also founded on the breach of the

agreement, assuming that it valid, and also on tort, because of the fraud on the minority shareholders being perpetrated by Lim Cheng Teek in conspiracy with Choong Keng Kor.

We have highlighted the various allegations on these issues earlier on and what we need to consider now is whether the statements contained in the affidavits of the plaintiffs have raised a prima facie plausibility to merit further investigation as to their truth. The breach of cl 3 of the agreement is a highly contentious issue in these proceedings. Encik Low's contention is that the balance of the purchase price should have been settled on the completion date which fell on 28 February 1993 or at the latest 1 March 1993, ie six months from the date of the agreement, but as far as the plaintiffs are concerned there had been no transfer to Choong Keong Kor because no evidence of the payment of the completion sum and no instrument evidencing the transfer of the shares had been produced. Besides, all the relevant forms under the National Land Code 1965 or the Companies Act 1965 were not exhibited as proof of the settlement of the purchase price.

A letter dated 15 April 1993 from MIDF Consultancy and Corporate Services Sdn Bhd to the plaintiffs' solicitors was exhibited to the effect, inter alia, that they had not received as on that date the instrument of transfer nor any instructions to transfer the shares registered in the name of the company to Choong Keong Kor. The MGR members circular No L/O1156 of 1992 dated 4 December 1992 and MGR share certificates registered in the name of the company dated 1 October 1992, 2 October 1992 and 3 December 1992, were also exhibited as further proof that the shares on those dates still belonged to the company. As had been adverted to earlier on, according to the exhibit the relevant charge was only discharged on 4 May 1993.

Then there was the other allegation that the agreement was ultra vires the resolution of the extraordinary general meeting of the company on 23 August 1992 and even if there was payment, which was denied, the completion date, was extended by Lim Cheng Teek without the resolution of the extraordinary general meeting of the company. On the question of the discharge of the charge, we are mindful that the provisions of s 278(1) of the National Land Code 1965 are relevant. Under this section, the discharge of the charge only takes effect from the date on which the instrument is registered and in this case it was on 4 May 1993. Encik Low also alleged that there was no evidence of the transfer of 97,000 shares which, according to the MGR circular, could be disposed of on 9 December 1993. The question in this respect is by whom and when were the shares disposed of and to whom?

As has been adverted to earlier on, there is another allegation that 292,500 shares were offered to the public and that another lot of 424,500 shares were transferred to UWB Nominees Sdn Bhd without the knowledge and consent of the shareholders and that the proceeds of the sale of these lots of shares were not accounted for to the company or to the shareholders. The next question raised in connection with the disposal of these two lots is who disposed of them or if they were disposed of by

Choong Keong Kor, whether in view of the absence of proof of his ownership of the shares the disposal of these shares was valid.

Encik Surinder Singh for Choong Keong Kor contended that there was payment of the completion sum or else the charge could not have been discharged and the payment must have been made much earlier than the registration of the discharge of the charge. The delay to register the discharge was attributed to administrative laxity or administrative problems. On being asked to produce the evidence of the payment of the balance of the purchase price within two weeks from the date of the hearing of this appeal, he agreed to do so but despite reminders from the Supreme Court no such evidence up to the time this judgment was written is forthcoming. Such tardiness or indifference on the part of the counsel is very much deprecated and should not be emulated. The legitimate inference that can be drawn from his failure to produce the evidence promised is that there had been no payment. Instead, Encik Choong Keong Kor delivered to us an affidavit dated 3 June 1994 in reply to an earlier affidavit affirmed by Encik Lim Tee Keng on 24 May 1994 where the latter alleged that no payment had been made and the agreement had not been executed. Encik Choong Keong Kor evasively replied to say that:

> In respect to the redemption sum of RM3m, there was never any averment that I had not paid the sum. The only point in dispute was whether it was paid in time so that the charge on the land was discharged and Hongkong and Shanghai Banking Corp Ltd have confirmed the same.

Encik Surinder Singh and Encik Choong Keong Kor obviously relied on the letter written by Hongkong and Shanghai Bank dated 26 February 1993 to Perusahaan Kilang Papan Buildstrength Sdn Bhd, Kota Kinabalu, for the attention of Mr Loy Lung Khiong where it was stated in para 3 thereof thus:

> With reference to our letter dated 25 February 1993, we advise we shall be expediting the discharge and release of the following security as requested:
> (1) our charge over the property held under Title No GN5905, Lot 4, Section 16, Town of Alor Setar, Kedah.

The reference to the title of the land in the letter is a reference to the land that was charged by the company and to be discharged by Choong Keong Kor to settle the balance of the purchase price referred to as the 'redemption sum'. In our view, this letter is not a clear and conclusive proof of the payment by Choong Keong Kor of the 'redemption sum'. We must also point out that in his affidavit dated 24 May 1994, Encik Lim Tee Keng stated that the letter dated 26 February 1993 was not addressed to Choong Keong Kor and that if there was any payment for the discharge of the charge as required under cl 3 of the agreement, it was not effected by Choong Keong Kor. It seems strange for Choong Keong Kor, if payment indeed had been made, to refrain from saying categorically and unequivocably in his affidavit that payment was effected by him on such and such a date and not produce the receipt. Nothing can be much simpler than for him to produce the receipt to reinforce Encik Surinder Singh's argument. Be that as it may, the burden to prove the payment of the completion sum is on the

defendants which so far had not been discharged to our satisfaction. The irresistible inference that could legitimately be drawn from the evasive reply and absence of proof of payment of the 'redemption sum' by Choong Keong Kor is the negation of the payment by him.

The remarks of Sir Robert Megarry VC in *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466 at p 974 are worth quoting:

> The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called 'serious' and no prospect of success which can be called 'real'.

All the issues raised by the plaintiffs adverted to above are prima facie serious issues to be tried and on the materials available there is no reason for us to say that they are not plausible.

Adequacy of damages

Encik Ghazi submitted that since the claim was the loss of profits on the sales of MGR shares to Choong Keong Kor, damages would be an adequate remedy which could be quantified and the question of interlocutory injunction did not arise. With respect, we disagree with his submission. A look at the prayers show that several different damages are claimed and are reproduced here for convenience:

(v–a) loss resulting from the increase of the original 628,500 shares to 1,365,000 shares after public listing of MGR;
(v–b) loss from the sale of 292,500 MGR shares to members of the public without the knowledge of the plaintiffs;
(v–c) loss as a result of the transfer of 424,500 shares to UWB Nominees Sdn Bhd;
(vi) general damages following the fraud;
(vii) loss as a result of misuse of information by the second defendant;
(viii) exemplary damages; and
(ix) aggravated damages.

The majority of these damages clearly do not admit of easy quantification and it would not be right for us to venture into the realm of speculation as to what the exact quantum would be at this stage of the proceedings. Besides, the value of the shares fluctuate from time to time. In this regard we find support in the observation of Sach LJ in the case of *Evans Marshall & Co Ltd v Bertola SA & Anor* [1973] 1 All ER 992 at p 1005; [1973] 1 WLR 349 at p 380 thus:

> The courts have repeatedly recognized that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation

> of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples — see also, in another sphere, the judgment of Jenkins LJ in *Vine v National Dock Labour Board* [1956] 1 QB 658 at p 676 which, albeit a dissenting judgment, was unanimously adopted in toto in the House of Lords. Generally, indeed, the grant of injunctions in contract cases stems from such factors.

In view of the doubt as to the adequacy of the remedies, it is incumbent upon us now to deal with the question of balance of convenience.

Balance of convenience

Encik Low for the plaintiffs submitted that the balance of convenience was in their favour since consistent with his earlier arguments on the serious issues to be tried and delay points, the Hongkong and Shanghai Bank was still the chargee, meaning of course that there was not yet at the material time payment of the completion sum in order for the charge to be discharged in accordance with cl 3 of the agreement. Therefore, there could not be a valid transfer to Choong Keong Kor of the MGR shares. Encik Surinder Singh disagreed with this argument and submitted that the charge had been discharged following inevitably the payment of the completion sum which allegedly had been paid. Similarly, since the relevant MGR shares had been registered following the transfer to Choong Keong Kor, the position of the parties had changed and under the circumstances an injunction would be an exercise in futility. The parties could not revert to status quo ante. What the plaintiffs in effect asked the court was the rescission of the agreement. Quoting *Chitty on Contract* (25th Ed) and Annand and Iyer in 1 *Specific Relief* (9th Ed), he said the agreement could not be rescinded by the party misled or defrauded after the position of the parties had been changed so that the former state of things could not be restored. Furthermore, a contract voidable for fraud could not be avoided when the other party could not be restored to its status quo and the only remedy in such a case was damages, quoting the case of *Sheffield Nickel Co Ltd v Unwin* (1877) 2 QBD 214. On this issue, Lim Cheng Teek averred in his affidavit that since the transaction was already completed, the company was merely a trustee for Choong Keong Kor until the necessary instruments had been registered. We agree with Encik Surinder Singh's submission only if it had been proved by uncontroverted evidence that the transfer of the shares had in fact been completed and registered, but as we have said earlier on, there is until now no such evidence before us. Such argument cannot be sustained, if, as is the case here, it is based upon a hypothesis that the sale had been completed within the time stipulated in the agreement and all that the purchaser was obliged to perform had in fact been performed. The validity and force of this argument is elided on account of the hypothesis.

Be that as it may, the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the court should take whichever course that appears to carry the lower risk of injustice. We are engaged in weighing the respective risks that injustice may result from deciding one way rather than the other at the stage when the evidence is

incomplete. On the one hand, there is the risk that if the interlocutory injunction is refused but the plaintiffs succeed in establishing at the trial their legal rights to the protection for which the injunction has been sought they may in the meantime have suffered harm and inconvenience or monetary loss for which an award of money can provide no adequate recompense. On the other hand, there is the risk that if the interlocutory injunction is granted but the plaintiffs fail at the trial, the defendants may in the meantime have suffered harm and inconvenience which is similarly irrecompensable.

It is necessary for us to examine the facts again and we may repeat in the process what we have discussed earlier in regard to other issues.

The factor that weighed heavily on the mind of the learned judge in deciding on the balance of convenience in favour of the defendants was the completion of the agreement and the subsequent transfer of the MGR shares to Choong Keong Kor. Several exhibits produced by Lim Tee Keng are enlightening.

Originally, MGR share certificate bearing No 00014 dated 2 October 1992 shows the company's shares to be 682,500 shares. By an MGR resolution dated 10 October 1992, allocation of new shares were approved by way of rights issue and then the company's 682,500 shares became 1,365,000, all still held by the company. According to the MGR worksheet, the company's shares in MGR are divided into three types:

(a) 292,500 shares were offered for sale;

(b) 648,000 shares were placed under moratorium; and

(c) 424,500 shares free from moratorium.

MGR's members' circular No L/O1156 of 1992 dated 4 December 1992 advised its shareholders, including the company, that a moratorium was imposed on the sale of their shares in MGR. Another exhibit shows that MGR offered 2,925,000 of its shares to the public, including the 292,500 of the company's shares, at RM2.30 each. However, no date when the offer was made was mentioned in the circular. It must be presumed in the absence of any evidence to the contrary that Lim Cheng Teek as managing director of the company must have taken the initiative to offer those shares for sale to the public and certainly the offer could not have come from MGR. Another important exhibit in so far as the question of the transfer of shares to Choong Keong Kor is concerned is the transfer of shares form. This form shows that 424,500 of the company's shares in MGR were transferred to UWB Nominees Sdn Bhd. What is interesting about this form is that it was signed by Lim Cheng Teek as managing director of the company on behalf of the company and an endorsement appearing above the signature of Lim Cheng Teek which reads 'There is no change in the beneficial ownership'. Another significant feature of the form is that in para 6 it is stated that the consideration for the transfer is 'nominal'. If the endorsement means what it says then the beneficial owner of the shares is still the company despite the apparent transfer. In his affidavit, Lim Tee Keng claimed that this transfer was executed on 18 November 1992. The

piquant question that arises is why should the transfer be subjected to the qualification and for a consideration expressed as 'nominal' which question is worthy of investigation at the trial. Is it intended to mean there is no actual transfer, the ownership of the shares being still vested in the company? We would respectfully say that it leaves us with the inexorable conclusion that it is a negation of the purported transfer of the 424,500 shares. As to the disposal of the 97,000 shares subject to the moratorium which could be disposed of on 9 December 1993, we were told by Encik Surinder Singh that they were disposed of after the ex parte injunction was dissolved but no specific date of the disposal or any concrete evidence to support his claim was produced.

Lending credence to all the exhibits is the letter from MIDF Consultancy Ltd of 15 April 1993, the vital portion of which we had already adverted to earlier on. It passes beyond the bounds of credibility that if there was a genuine transfer of shares to Choong Keong Kor, why should he be evasive about the payment of the completion sum and the shares still be registered in the name of the company and not the purchaser, considering that the burden to prove the payment and the transfer was on him? All these exhibits tend to point to the inescapable conclusion that the allegation of fraud is not without any basis and that there is more than meets the eye. It may well be that some perfidious scheme is afoot to carry out the fraud as alleged by the plaintiffs which the proper trial could uncover.

Having regard to our observations above, it can be seen that at one end of the spectrum of possibilities if the plaintiffs fail at the trial, all that the defendants would suffer because of the injunction is the loss of profits and costs of the litigation which can be quantified and the defendants could adequately be compensated and at the other end if the injunction is refused and the plaintiffs should succeed, they would suffer unquantified monetary loss, harm and inconvenience which could not be adequately recompensed. In that case, more injustice would be done to the plaintiffs. In addition, since on the evidence before us there is no vestige of the transfer of the shares to Choong Keong Kor or to any other persons, the status quo may be preserved which should be the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the application for an interlocutory injunction, the period immediately preceding the application. (See Lord Diplock's judgment in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 at p 140C–D; [1983] 2 All ER 770 at pp 774–775; [1983] 3 WLR 143 at p 148. The balance of convenience clearly, therefore, lies with the plaintiffs.

For the reasons we have given above on all the issues raised in this appeal, we are all of the view that this appeal should be allowed with costs here and below and the interlocutory injunctive orders be restored until further order. The deposit is to be refunded to the plaintiffs.

Finally, for the purpose of completeness, we would briefly touch on the scope of the interlocutory injunctive orders. As can be seen from para 20 of the statement of claim the first two prayers concern injunctive

orders. Prayer (i) is for an order to restrain the first defendant and the second defendant, their servants, agents, employees or any other persons from disposing of the shares or registering the 'executed' memorandum of transfer referred to in the agreement dated 1 September 1992 between the company and Choong Keong Kor, and prayer (ii) is for an order that the registration of the 'executed' memorandum of transfer between the company and Choong Keong Kor and the transfer of the shares in the name of Choong Keong Kor or his nominees or any other persons be restrained. The transfer of the MGR shares that is referred to in these two prayers is the transfer of the original 682,500 shares in MGR but which subsequently proliferated to 1,365,000 shares after the allocation of the rights issue and bonuses accruing from 682,500 shares. It is a fait accompli and, therefore, there is no sense in talking about 682,500 shares to be subjected to the injunction. However, as we have arrived at the conclusion that there is no evidence that the 1,365,000 shares have changed hands, neither to Choong Keong Kor nor to UWB Sdn Bhd or any other persons, therefore, all these shares should be the subject matter of the injunctive orders claimed. However, we note that in prayer No (v–c) compensation was claimed on the transfer of the 424,500 shares and in prayer No (v–b) an account of the sale of 292,500 shares offered to the public. It would appear that there is a contradiction between the two prayers and the argument canvassed in the High Court below and before us. Consistent with our view on the ownership of the shares, which upon the evidence available in the record of appeal would still appear to be vested in the company, therefore, the interlocutory injunction orders should cover the whole of the 1,365,000 shares as well as those other shares referred to in the agreement.

Finally, in the interest of justice there will also be an order for an early trial.

Appeal allowed.

Reported by Prof Ahmad Ibrahim